UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

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SUD-CHEMIE, INC.

10 **and**

CASE 9-CA-43779

BRADLEY S. EVERETT, an Individual

Eric V. Oliver, Esq., for the Government. ¹
 James U. Smith, III, Esq., and Oliver B. Rutherford, Esq., for the Company. ²
 Bradley S. Everett, Pro Se³

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DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful suspension and discharge case. I heard this case in trial in Louisville, Kentucky, on December 18, 2007. The case originates from a charge, filed by Bradley S. Everett, an Individual, on August 16, 2007, against Sud-Chemie, Inc., (Company). The prosecution of this case was formalized on October 9, 2007, when the Regional Director for Region 9 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued a Complaint and Notice of Hearing (Complaint) against the Company.

The complaint alleges the Company, on or about July 18, 2007, suspended and on or about August 2, 2007, discharged its employee Everett, a steward for General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American (Union), for concertedly complaining to the Company about a proposed change in the Company's policy concerning the acceptance of doctor's excuses for employee absences and for filing charges under the National Labor Relations Act (Act) in violation of Section 8(a)(1), (3) and (4) of the Act.

The Company, in a timely filed Answer to the Complaint, denied having violated the Act in any manner alleged in the Complaint.

¹ I shall refer to Counsel for General Counsel as Counsel for the Government or Government.

I shall refer to Counsel for the Company as Counsel for the Company or Company.

³ I shall refer to Charging Party as Everett.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified. I have studied the whole record, the post trial briefs, and the authorities cited therein. Based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

Findings of Fact

I. Jurisdiction, Labor Organization Status, and Supervisor/Agency Status

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The Company is a corporation with an office and place of business in Louisville, Kentucky, where it is, and has been, engaged in the production and sale of catalysts. During the 12 months ending October 9, 2007, a representative period, the Company sold and shipped from its Louisville, Kentucky facility, goods valued in excess of \$50,000 directly to points outside the Commonwealth of Kentucky. The evidence establishes, the parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted that Company Manager Bill Furlong (Company Manager Furlong), Human Resources Manager Scott Hinrichs (HR Manager Hinrichs), Human Resources Representative Kathleen Prebys (HR Representative Prebys), Coordinator Ron Massey (Coordinator Massey), Plant Manager Glen Hopkins (Plant Manager Hopkins) and Supervisor David Bell (Supervisor Bell) are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

II. Alleged Unfair Labor Practices

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A. Facts

1. Background

The Company is a German owned worldwide organization with five sites in the United States two of which are located in Louisville, Kentucky. The only facility involved herein is the Company's West Hill Street, Louisville, Kentucky location. The Union represents approximately 76 production and maintenance employees at this location and the Union and Company are parties to a collective-bargaining agreement covering the employees effective from May 1, 2006, through April 30, 2009.

2. Everett's Grievance and Charge Filing Activities

Everett was a 21-year production technician at the Company and a long time active union member. During his employment, Everett served "on and off" as an elected union steward for a total of 13 years. Union steward positions are elected for terms of various lengths. Everett said his union steward duties were that of collective-bargaining agreement enforcer and grievance processor. In that regard, Everett filed an unfair labor practice charge with the Board on July 12, 2007, alleging the Company unilaterally changed mandatory overtime. Everett estimated he filed approximately ten grievances in 2007, with his most recent being a class action grievance filed on July 17, 2007, in which it was contended the Company unilaterally implemented mandatory overtime. Everett was told by Supervisor Bell on July 16 or 17, 2007, that union business could only be conducted on breaks or lunch times. According to Everett, prior to this time there had been no restrictions regarding when union business could be conducted.

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3. Everett's Meeting With HR Representative Prebys

Everett reported for work, as usual, at approximately 5:30 a.m. on July 17, 2007. At around 11:00 a.m. he spoke with Supervisor Bell, in Bell's office. Bell invited Everett to look at an e-mail advising him "you're not gonna like it." The e-mail was a formatted memorandum to be posted on employee bulletin boards and related to doctors' statements for employee absences from work. Everett wanted to know where the memorandum came from. Bell told him it came from HR Representative Prebys. Everett explained the memorandum stated preprinted doctors notes that simply reflected "seen by doctor" or "visited doctors office" would no longer be acceptable that doctors' statements needed to also reflect whether an employee was able to return to work or not. Everett thought this additional information was probing into personal issues between a doctor and an employee patient. Everett believed the additional explanations constituted a unilateral change that he "didn't think . . . would go over well in the plant." Everett made a copy of the e-mail and located Chief Union Steward William Colston (Chief Steward Colston or Colston) and they reviewed the e-mail.

Everett and Chief Steward Colston then left the plant area and went to the main offices to meet, unannounced, with HR Representative Prebys where the three met for approximately 10 minutes.⁵ Everett spoke first asking, "Kathleen [Prebys] who instructed you to put this out?" HR Representative Prebys responded by asking if he had a problem with it. Everett testified he told Prebys:

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I don't think our personal business with our doctor is any of your business. We had the same policy around here for 50 years, whatever note the doctor gave us to bring to you was acceptable. And now you're trying to

Everett on July 14 or 15, 2007, withdrew the unfair labor practice charge on the advice of an agent of the Board who was investigating the charge. According to Everett, the Board Agent advised him to withdraw the charge which he had filed as an individual and have the Union re-file it. Everett said he never had an opportunity to re-file the charge.

⁵ Near the end of the meeting, Supervisor Bell joined them.

make a unilateral change and say that these notes that we've used forever are not acceptable.

Chief Steward Colston said Prebys was adamant the Company was not changing anything by the notice but that Everett told Prebys, "This is a breach of the contract. I'm up here trying to stop grievances from happening now." Colston said Prebys "was as direct as Brad [Everett]" during the exchange. Everett repeated he did not think HR Representative Prebys had the right to do what she was attempting with the e-mail and notice. According to Everett, Prebys could not understand why he was so upset explaining that her predecessor Jenny Shuman had posted the same identical notice in 2003. Everett told Prebys he had never seen a notice resembling the current one and if Shuman had posted such a notice it was no longer posted. Everett also told Prebys that if the previous notice had been posted he would have been talking to Shuman just like he was talking to Prebys. Everett testified Prebys then "kind of flung" the e-mail notice down on her desk and said she would talk with Plant Manager Hopkins before she posted it. Everett responded, "if it gets posted I will be right back up here with a grievance" and left Prebys' office.

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Everett explained that while he was in Prebys office he stood about 4 feet from her while she sat behind her desk. He said his voice was "above average in volume" but he never used profanity and in no way threatened or intimidated or even tried to intimidate Prebys. Everett said he always spoke loudly because it was very noisy in the plant where he worked and that employees wore ear plugs because of the noise level in the plant. Everett acknowledged he was in an "agitated state" at the meeting but did not point toward or make any physical jesters at Prebys. Chief Steward Colston testified Everett's voice was always raised but he was not yelling, screaming, or using profanity and did not point his finger at Prebys.

Everett testified HR Representative Prebys was not happy that he objected to her posting the notice, but such was a common occurrence in their roles and discussions. Everett explained that he and Prebys met daily to discuss work related matters. Everett and Chief Steward Colston testified Prebys never said anything during the meeting to indicate she was disturbed by Everett's conduct and never asked Everett to tone down his voice or to stop or leave the room.

After Everett left the meeting with Prebys he returned to work and later went to Supervisor Bell's office to place an order for lunch. According to Everett, Bell told him, "you know good and well that raising your voice isn't going to accomplish anything" and encouraged Everett to apologize to HR Representative Prebys. Everett told Bell he would telephone Prebys right then if Bell though that was what he should do. Bell, however, told Everett, Prebys had left the plant for a business luncheon in town. Chief Steward Colston saw Everett in Supervisor Bell's office with papers in his hand, which he thought related to the email notice, so he went to the office and asked Everett what he was doing. Everett told Colston he was writing a note of apology to Prebys. Colston asked why. Everett said Supervisor Bell thought maybe he got a little loud at the meeting. Colston told Everett, "Brad, you were no more louder than you ever are." Everett sent Prebys a handwritten note through the Company's interoffice mail system which reads:

Kathleen,

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On a personal note, I apologize for getting so excited and I certainly didn't mean to upset or offend you. This is a very frustrating situation and I vented on the wrong person.

Brad

Everett worked the remainder of the day and for approximately 5 hours the following day July 18, 2007, at which time Supervisor Bell told Everett that Plant Manager Hopkins wanted to meet with him and Chief Steward Colston in the conference room. The three met and Plant Manager Hopkins told Everett, "Brad, I'm sorry, but I'm going to have to suspend you for threatening Kathleen [Prebys]." Everett denied threatening Prebys. responded, "You don't necessarily have to say something to be threatening." Everett asked Hopkins if he saw him "make any movements or jesters to threaten her." According to Everett, Hopkins said, "no. You were a little loud so I got up and closed my door." Everett protested that Plant Manager Hopkins had not heard nor seen him do anything but was suspending him for threatening Prebys. Chief Steward Colston testified Hopkins told Everett he had acted, "unprofessionally" at his meeting with Prebys and had created a "ruckus." Hopkins told Everett, however, not to worry there would be an investigation. Everett suggested to Hopkins he was getting the cart before the horse that he should investigate before suspending. Hopkins told Everett it was a serious matter. Everett then asked Hopkins if he knew he had filed Board charges "on you and the Company." According to Everett, Hopkins said he had gotten the paperwork on his desk that morning. Everett asked "Well, don't you find the timing of this suspension a little suspect?" Hopkins said the two matters were not related and Everett responded, "Well they are now." Chief Steward Colston said Board charges were discussed. Colston asked if they could work this out some way other than a suspension. Hopkins responded the decision to suspend Everett had already been made and the meeting ended.

A meeting was held at the Company on July 24, 2007, regarding Everett's suspension. Those attending were Company Manager Furlong, HR Manager Hinrichs, Union Business Agent John Colvin Bolten (Union Business Agent Bolten) Chief Steward Colston, Everett and "possibly" Plant Manager Hopkins. According to Everett, HR Manager Hinrichs said he had questioned HR Representative Prebys about her version of events. Everett agreed with Prebys' version as explained to him at that time. Everett later learned certain things were supposed to have been said that he did not agree were said. Everett testified HR Manager Hinrichs offered him reinstatement with a last chance warning and forfeiture of pay from his suspension until his reinstatement. Everett, in rejecting the offer, explained he did not think a last chance warning was merited because he had not done anything wrong. The meeting ended.

Everett testified he received a telephone call from Union Business Agent Bolten on August 1, 2007, advising him of a meeting with the Company on August 2 at which time Bolten believed the Company would terminate Everett. The meeting was held as scheduled and HR Manager Hinrichs, HR Representative Prebys, Plant Manager Hopkins, Union Business Agent Bolten, Chief Steward Colston and Everett, along with possibly one other

person were present. Hinrichs handed Everett a letter of dismissal and told Everett he had left him with no choice but to terminate him. The dismissal letter reads as follows:

On or about July 17, 2007, your behavior directed at Kathleen Prebys, HR Generalist was intimidating and completely unacceptable. Consequently, it has been determined by Management that your behavior on July 17, 2007, was a direct violation of Company Rule No. A*21, "Violent, Threatening, or Intimidating behavior or acts will not be tolerated." Work rules marked with an * are grounds for immediate dismissal.

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Based on the work rule, the right and proper remedy for this violation is immediate dismissal. The employee record will reflect the termination date of 8/2/07.

Everett told Hinrichs, "I can't believe you're terminating me for threatening behavior" and asked, "If I was so threatening and so intimidating and so violent how come you didn't remove me from the property?" Everett continued, "How come you didn't have me escorted out the gate like you do every other person that's terminated for a serious offense?" Everett said Hinrichs did not respond. Everett testified Union Business Agent Bolten asked HR Representative Prebys, "How come you didn't say anything like stop or tone it down or you know, could you please be quiet, this is getting uncomfortable." According to Everett, Prebys held up her hands and said she had asked at the July 17, 2007 meeting for Everett to "Please stop, please stop." Everett said at that point his and Chief Steward Colston's eyes lit up and they both responded, "simultaneously" "that didn't happen."

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Everett was aware of the Company's work rules including Rule A*21 but added he was not aware of any other employee ever being fired pursuant to that rule.

South Plant Bargaining Unit Rules for Employees, Rule, A*21, reads as follows:

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Violent, threatening or intimidating behavior or acts will not be tolerated.

Rule A*21, an asterisk rule, indicates that a first violation is cause for immediate discharge.

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4. The Company's Evidence

Supervisor Bell testified he received an e-mail with an attached memorandum for posting from HR Representative Prebys, on July 17, 2007. Bell showed the memorandum to Everett. According to Bell, Everett was upset with the notice which pertained to doctors' statements, specifically the portion that required more response on a doctor's notice than just "seen in the office" that the notice must also include whether an employee was "unable to work." Bell testified Everett was "a little loud" and appeared to be "angry" and Everett left Bell's office. Bell observed Everett meeting with Chief Steward Colston but could not hear what the two said. Supervisor Bell said he did not post the notice because of the concerns Everett raised.

HR Representative Perbys acknowledged she sent the e-mail in question on July 17, 2007, addressed to coordinators (Supervisors) and the Plant Manager regarding "requirements for doctor's statements" along with a notice on the subject for posting. Prebys' e-mail reads as follows:

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Good Morning

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I have received a few doctors' notes recently that simply indicate the employee was "seen in the office," but do not state that the employee is excused from/or unable to work. In order to clarify our requirements, please see the attached notice for employees – I will print out color copies to post.

Please call me if you have questions – Thanks!

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Prebys testified that shortly after she sent the e-mail Chief Steward Colston and Everett "unannounced" and "totally unexpectedly" "bolted" into her office. According to Prebys, Everett positioned himself in front of her desk "maybe about 3" feet away and "yelling" in reference to the posting saying:

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You can't do this. You can't post this. Since when have we ever asked for unable to work statement. What did you and Glenn [Plant Manager Hopkins] do to change this policy? Why are you changing things? You know, you have no right to do this.

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Prebys was unable to respond because there was not a time "I could interrupt where he was listening." Prebys said at the end of the meeting she asked Everett "can you lower your voice" and motioned with her hands because she was concerned about who might be hearing what was taking place. According to Prebys, Chief Steward Colston stood quietly without interjecting himself and that Supervisor Bell "came in right at the tail end" of the meeting. Prebys said she was "appalled" and "surprised" by Everett's actions and never expected anything like it. Prebys explained that since working for the Company she had "never had the sense that anyone would . . . treat [her] in that manner or talk to [her] in that manner" for Prebys it was "very intimidating" she was "sick to [her] stomach" and "made [her] feel embarrassed." Prebys explained that her embarrassment and being frightened was "that other people heard his [Everett's] conduct and the way he treated me with just [a] lack of respect and embarrassed me." She said he was angry in her face and "didn't concern himself at all with anybody else's feelings." Prebys told Everett she was not going to post the notice at that time.

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Prebys had, in the past, dealings with Everett regarding Company policies, grievances and union steward-type matters, but said Everett had never before acted in the manner he did at this meeting. Prebys said Everett left her office but that Chief Steward Colston and Supervisor Bell remained for a few additional minutes. Prebys "mostly" further explained the posting and tried to "defuse the situation." Prebys also told Colston and Bell she would not post the notice until she had talked with HR Manager Hinrichs.

HR Representative Prebys attended a preplanned Company sponsored luncheon away from the facility shortly after her meeting with Everett. HR Manager Hinrichs, who was at the meeting, noticed Prebys was not her happy self. Hinrichs asked Prebys what was bothering her. Prebys told him she had an issue with Everett that morning and was "upset." Prebys then explained in very broad terms what had occurred. Hinrichs indicated he would follow up with her on the matter later that afternoon.

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Prebys, after lunch, returned to her office and discovered she had an interoffice communication from Everett in which he sent her a handwritten apology. Prebys immediately telephoned HR Manager Hinrichs and told him about the note of apology as well as further filling him in on the events of the morning. Hinrichs wanted to know from Prebys if she felt the note was adequate. Prebys told Hinrichs she didn't "feel any better seeing that note." Hinrichs promised Prebys he would further investigate the incident.

Company Manager Furlong, Plant Manager Hopkins and HR Manager Hinrichs met with Prebys the next morning July 18, 2007. Prebys gave them a verbal statement about the events of the prior day. HR Manager Hinrichs explained Prebys told the group Everett had come to her office "yelling" at her regarding a posting related to doctors' reports for absences. Hinrichs said Prebys described Everett as "very loud," "screaming," and "yelling" but added there was no "cursing," "finger pointing," or "climbing over the desk or anything to that extent." Hinrichs testified Prebys told him coordinators (supervisors) Robert O'Brien and Jeff Kirchner,⁶ who each have offices three doors from Prebys', in the same office complex asked her what was going on with the loud exchange.

Hinrichs testified he met with O'Brien that afternoon. O'Brien told Hinrichs he heard Everett coming up the hallway in front of his office speaking loudly and entering HR Representative Prebys' office where he was "yelling" at Prebys for approximately 5 to 10 minutes. Hinrichs stated he decided, after speaking with O'Brien, to suspend Everett pending further investigation. Hinrichs instructed Plant Manager Hopkins to carryout the suspension and Everett was suspended that afternoon pending further investigation.

HR Manager Hinrichs met with Company Coordinator Kirchner on July 20, 2007, regarding the events of July 17, 2007. Kirchner indicated in writing to HR Manager Hinrichs that Everett had a "heated" discussion with HR Representative Prebys saying such things as "you cannot do this." Kirchner's written report to Hinrichs indicates Everett was "aggravated" and "taking it out on Kathleen" "in a threatening way."

HR Manager Hinrichs testified he, along with Plant Manager Hopkins and Company Manager Furlong, met with Everett and Chief Steward Colston on July 24, 2007. According to Hinrichs the "intent for the meeting was to seek out Brad's [Everett's] perspective on what had taken place that day [July 17, 2007]." Hinrichs testified Everett "was remorseful" "for being loud" at HR Representative Prebys but said he did not intend nor was he intimidating,

The two above names are reflected in the Transcript as O'Bryan and Kershner, however, elsewhere in the record it indicates the correct spelling is as reflected above. The evidence indicates that either spelling refers to the same two individuals.

threatening or violent towards her. Hinrichs described the meeting as fact finding only and no determination or decision was made regarding any discipline for Everett.

HR Manager Hinrichs testified he considered the fact Everett was a long standing employee of the Company with no performance related issues in deciding what disciplinary would be appropriate for Everett. Ultimately Hinrichs concluded nothing would mitigate Everett's offense of "yelling" at HR Representative Prebys. Hinrichs testified nothing else was considered to be intimidation by Everett towards Prebys other than Everett's yelling at Prebsy.

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HR Manager Hinrichs issued a dismissal notice for Everett on August 2, 2007 and met with Everett in a Step C grievance meeting on August 3, 2007, concerning Everett's suspension. At the August 3 meeting, the grievance was converted to a separation hearing and the dismissal notice was given to Everett.⁷ The decision to terminate Everett was not changed at the August 3 grievance meeting.

According to Hinrichs, the Union never dropped the matter and from time to time thereafter continued to raise the issue of Everett's dismissal. On October 16, 2007,8 the Company proposed an accommodation regarding Everett's grievance offering to bring Everett back to work under a disciplinary last chance agreement. The disciplinary last chance agreement was, according to Hinrichs, very narrow in scope indicating that any violation of a similar work rule would result in Everett's dismissal. HR Manager Hinrichs testified Everett, through Union Business Agent Bolten, rejected the last chance agreement indicating he would only return to work without conditions. Hinrichs thereafter personally contacted Everett, who told Hinrichs he would not return to work with conditions.

B. Analysis, Discussion, Credibility Resolutions and Conclusions

Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee himself. *Meyers Industries* (Meyers I), 268 NLRB 493 (1984) and Meyers Industries (Meyers II), 281 NLRB 882 (1986).

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The parties admit, and the evidence establishes, that the July 17, 2007 meeting, which was primarily between HR Representative Prebys and Everett, was concerted activity protected by the Act. The meeting involved working conditions, namely, what wording would be required on doctors' statements for employee absences. Everett was, prior to the meeting, shown an e-mail from Prebys to management that concerned what he perceived to be a unilateral change regarding doctors' statements. Everett was shown the e-mail by his immediate supervisor because he was a union steward. After reviewing the e-mail, Everett visited with Chief Steward Colston to discuss the outlined requirements for doctors'

⁷ The dismissal letter is set forth in full elsewhere herein.

The Company and Everett do not agree on what date the last chance agreement was proposed. I find it unnecessary to decide which date inasmuch as there is no question that Everett rejected it.

statements. Everett believed the requirements would not go over well with the unit employees at the plant. Immediately following Everett's meeting with Chief Steward Colston, the two of them visited HR Representative Prebys in her office specifically about the perceived changes. Everett was engaged in discussions with HR Representative Prebys on behalf of all employees in the bargaining unit and was doing so as union steward. Everett stated he was attempting, in the meeting, to address potential employee concerns and eliminate potential grievances. The meeting involved working conditions, Company rules, and the parties' collective-bargaining agreement all of which constitute concerted activity that is protected by the Act, and I so find.

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The issue now becomes whether Everett's conduct in the July 17 meeting was so offensive that his otherwise protected activity became unprotected. Stated differently, some concerted conduct can be expressed in so intolerable a manner as to lose the protection of Section 7 of the Act. While legal descriptions of the sort of behavior which withdraws the protection of the Act from concerted activity has varied, a general statement of the law may be summed up that communication occurring during the course of otherwise protected activity will remain protected unless it is found to be so violent or of such serious character as to render the employee unfit for further service with the employer. Again stated differently, an employee's otherwise protected activity may become unprotected "if in the course of engaging in such activity [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language" *American Hospital Assn.*, 230 NLRB 54, 56 (1997). In deciding this type issue, the *Wright Line*, 251 NLRB 1083, 1089 (1980) analysis is unnecessary. See *Honda of America Mfg.*, 334 NLRB 751, 753 (2001) and *Aluminum Co. of America*, 338 NLRB 20 (2002).9

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In weighing whether Everett's conduct at the July 17 meeting with HR Representative Prebys was so offensive that his otherwise protected activity became unprotected, it is helpful to review some of the Board's decisional stances on such issues. The Board in *Honda of America Mfg.*, 334 NLRB 751 (2001) set forth some over all principles namely:

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The Supreme Court has placed its imprimatur on the principle that our Act protects language during protected activity that "might well be deemed actionable per se in some state jurisdictions." *Linn v. Plant Guards Local 114*, 383 U.S. 53, 58 (1966). 'Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language.' Id. (citation omitted). Such 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.' *Letter Carriers v. Austin*, 418 U.S. 264, 272 (1974).

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The protection that our Act provides employee verbal and written expressions during the course of protected activity is not without limitation. Otherwise protected activity may become unprotected 'if in the course of engaging in such activity, [the employee] uses sufficiently opprobrious, profane, defamatory, or malicious language.' *American*

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But see *Bridgestone Firestone South Carolina*, 350 NLRB No. 52 (2007) where the Board applied, without explanation, a *Wright Line* analysis in a similar case.

Hospital Assn., 230 NLRB 54, 56 (1977). Nonetheless, '[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.' *Linn*, supra at 63.

In assessing whether Everett's conduct remained protected notwithstanding his loud encounter with HR Representative Prebys, I find the Board's teachings in *Atlantic Steel Company*, 245 NLRB 814, 816 (1979) to be instructive. There the Board noted as to whether an employee has crossed the line between concerted protected activity and losing that protection depends on several factors, namely: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." The Board urges these various factors be carefully balanced in deciding if an employee has crossed the line separating acceptable from unacceptable behavior.

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As set forth elsewhere herein, Everett, on July 17, 2007, along with Chief Steward Colston, went to HR Representative Prebys' office to discuss an imminent posting regarding the content of doctors' statements pertaining to absences for bargaining unit employees. There is no contention that Everett's prior meeting with Chief Steward Colston, in the plant area, was loud or that Everett was yelling or otherwise being disruptive. In fact Supervisor Bell saw Everett and Colston talking in the plant area but could not hear what they were saying. Everett spoke loudly as he passed through the main office area of the plant enroute to Prebys' office. Those who heard, but did not interrupt Everett, as he passed through the office area were all supervisors or managers. However, Everett's discussion with management did not begin until he and Chief Steward Colston were in HR Representative Prebys' office, away from rank and file employees and as such could not have disrupted rank and file workplace discipline. Thus, the first of the four *Atlantic Steel* factors weighs in favor of protection for Everett's discussion with Prebys.

The subject matter at the July 17, 2007, meeting dealt with working conditions for the unit employees. Everett was notified by his immediate supervisor, Bell, that a notice pertaining to doctors' statements was going to be posted and he was not going to like it. In fact, Everett immediately concluded he did not think the requirements on doctors' statements would go over well with the rank and file unit employees in the plant. Immediately upon entering Prebys' office. Everett wanted to know who had instructed that the notice, with instructions regarding doctors' statements, be posted. Everett contended the instructions constituted a unilateral change and a breach of the parties' collective-bargaining agreement. Everett explained to Prebys he was "up here" in her office trying to stop grievances from happening. Everett also argued Prebys was attempting to change a policy that had been in practice for 50 years. When HR Representative Prebys explained to Everett the notice she was directing to be posted was identical to one that had already been posted at the plant since 2003, Everett responded he had never seen such a notice and if it had been it no longer was posted at the facility. Prebys told Everett she would not post the notice until she had conferred with the plant manager. The notice was never posted. It is crystal clear that the subject matter discussed concerned working conditions for, among others, rank and file bargaining unit employees. The subject matter being discussed weighs in favor of protection for Everett.

The nature of Everett's conduct in the meeting with Prebys requires that a determination of exactly what took place during the meeting be made. All three individuals present at the meeting testified about the meeting and their testimony, for the most part, was corroborative but there were some differences. This much is certain that Everett was loud and agitated. Supervisor Bell testified Everett was even "a little loud" and appeared to be "angry" when he first read the notice in Bell's office and before he had made it to Prebys' office. Everett acknowledged he was in an "agitated state" and that his voice was "above average in volume" when he and Chief Steward Colston met with Prebys. I note it is undisputed that employees wear ear plugs in the factory because of the noise level and it is also undisputed that Everett always speaks loudly.

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I found Chief Steward Colston to be a very credible witness. His facial expressions and sincere demeanor persuades me he testified truthful to the best of his recall and ability. Chief Steward Colston described Everett's voice as raised at the meeting but that he was not yelling, screaming nor pointing his finger at Prebys. It is undisputed that Everett never used profanity during the meeting and that he stood approximately 3 to 4 feet away from Prebys with her desk between them. HR Representative Prebys, on the other hand, appeared, as she testified, to apparently still be angry about the meeting and her continued anger, for me, called in question her willingness or ability to testify accurately about certain events of the meeting. I do not credit Prebys' testimony that she was unable to respond at the meeting because there was not a time when she could interrupt where Everett was listening. I rather credit Everett's and Colston's testimony that she wanted to know if Everett had a problem with the posting and insisted the Company was not changing anything with the language of the notice. In that regard Chief Steward Colston credibly described Prebys as adamant there was no change in policy with the notice and that Prebys "was as direct" as Everett during their exchange. In light of the above and other factors I find unbelievable that this seasoned human resources representative could not respond because there was not a time when Everett would be listening. I note it is undisputed Everett and Prebys had met on prior occasions to discuss work related matters in their capacities as union steward and human resources representative. Having concluded that Prebys' testimony is not fully accurate, I credit Everett's and Colston's testimony that HR Representative Prebys never asked Everett to tone down his voice, to stop, or leave her office.

I am persuaded that Everett's conduct during his exchange with Prebys in her office mitigates in favor of protection of the Act for Everett. While Everett's exchange with Prebys may have been loud I conclude the exchange did not constitute a challenge to Prebys' dignity nor would it be considered threatening or intimidating. It was a robust exchange between a union steward and a human resources representative. The fact that Prebys may have perceived that the situation made her sick to her stomach, embarrassed and treated with a lack of respect does not call for a different conclusion on the nature of Everett's conduct. The purposes of the Act would be meaningless if one did not take into account the realities of industrial life and the fact that disputes over working conditions are most likely to engender strong, even loud, responses that may bring about hurt feelings and perceived embarrassment. The fact Everett sent an apology note to Prebys for getting "so excited" at the meeting does not call for a different conclusion on this factor. Everett sent the apology note because he was advised by his supervisor that he was not going to be able to accomplish what he wished to by being loud. It appears Everett was motivated to send his note of

apology in order to help accomplish relief from what he perceived to be a change in doctors' statements.

The final factor to examine is whether Everett's conduct was provoked by any unfair labor practice on the part of the Company. It does not appear the Company did anything unlawful that directly provoked or caused Everett to have a loud exchange with Prebys. However, Everett in response to Prebys' adamant assertion the Company was not changing anything regarding doctors' statements, told her what she was doing was a breach of the parties collective-bargaining agreement. Everett in essence contended the Company's actions constituted a unilateral change in working conditions. Such actions by the Company could lead to the filing of unfair labor practice charges and to a degree explain Everett's conduct. Everett simply made a spontaneous, emotional and loud response to the Company's actions related to doctors' statements. Again this *Atlantic Steel* factor weighs in favor of protection for Everett in his meeting with HR Representative Prebys.

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Considering all the above circumstances, I conclude Everett's loud exchange with HR Representative Prebys regarding working conditions did not remove him from the protections of the Act. I conclude the Company violated the Act when it suspended, and thereafter terminated, Everett for his conduct at the meeting with Prebys on July 17, 2007.

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Conclusions of Law

1. By on or about July 18, 2007, suspending and thereafter on August 2, 2007, discharging Bradley S. Everett because he engaged in protected concerted activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.¹⁰

Remedy

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Everett, the Company must offer him reinstatement and make him whole for any lost wages and benefits as a result of his July 18, 2007, suspension and August 2, 2007, discharge, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend the Company be ordered to remove from its files any reference to the July 18, 2007, suspension and the August 2, 2007, discharge.

On these findings and conclusions of law and on the entire record, I issue the following recommended:11

I find it unnecessary to decide if the Company's actions against Everett violate any other Section(s) of the Act inasmuch as such findings, if made, would not impact or change the recommended remedy herein

If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, Sud-Chemie, Inc., its officers, agents, successors, and assigns, shall:

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- 1. Cease and desist from:
- (a) Suspending, discharging or otherwise discriminating against employees for engaging in concerted activity protected by the Act.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the policies of the 15 Act:
 - (a) Within 14 days from the date of the Board's Order, offer Bradley S. Everett full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make Bradley S. Everett whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in The Remedy section of this decision.
 - (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge of Bradley S. Everett, and within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its West Hill Street facility in Louisville, Kentucky, copies of the notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the

If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

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facility involved in these proceedings, the Company shall duplicate and mail, at its own
expenses, a copy of the notice to all current employees and former employees employed by
the Company at any time since July 18, 2007.

5	Dated at Washington, D.C., February 20, 2008.		
10		William N. Cates	_
		Associate Chief Judo	70

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

10 FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge or otherwise discriminate against any of you for engaging in protected concerted activity.

- WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.
- **WE WILL**, within 14 days from the date of this Order, offer Bradley S. Everett full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - WE WILL make Bradley S. Everett whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

CUD CHEMIE INC

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Bradley S. Everett, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

<u>50</u>	(Employer)	
By:		
(Representative)	(Title)	
	Ву:	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street - Room 3003, Cincinnati, OH 45202-3271 (513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING
AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY
QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE
DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3663

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